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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON PATRICK MASCIO,

Defendant and Appellant.

D075553

(Super. Ct. No. RIF1700753)

APPEAL from a judgment of the Superior Court of Riverside County, Steven G. Counelis, Judge. Judgment conditionally reversed and cause remanded with directions.

Richard Schwartzberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Robin Urbanski and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Jason Patrick Mascio of willfully and unlawfully carrying a concealed dirk or dagger on his person (Pen. Code,¹ § 21310; count 1) and willfully and unlawfully resisting arrest (§ 148, subd. (a)(1); count 4). The jury also found true three prior conviction allegations and a prior strike allegation. The trial court sentenced Mascio to a six-year prison term.

Mascio contends that insufficient evidence supports his resisting arrest conviction. We reject this assertion. He also contends that this matter should be remanded to the trial court for a mental health diversion eligibility hearing under newly enacted section 1001.36. We conclude that there is sufficient evidence in the record suggesting that Mascio can make a *prima facie* showing of eligibility for mental health diversion under section 1001.36. Accordingly, we conditionally reverse the judgment for the limited purposes specified *post* in the disposition. Finally, Mascio claims, and the People agree, that the April 27, 2018 minute order should be amended to accurately reflect the trial court's dismissal of two drug counts.

FACTUAL BACKGROUND

On an afternoon in December 2016 a Riverside County sheriff's deputy responded to a convenience store after receiving a report from employees at the store about an aggressive man who refused to leave the property. When the deputy arrived at the store he met Mascio outside. Mascio appeared upset with the store employees. The deputy's

¹ Undesignated statutory references are to the Penal Code.

body camera recorded the encounter and the prosecution played the recording for the jurors.

Mascio told the deputy that the store employees had harassed him and accused him of stealing. Mascio offered to provide identification and stated that he did not consent to a search because he was not on parole or probation. After the deputy told Mascio that he would do a weapons pat down, Mascio said "no" and then stated "here's a weapon a right here" and reached for a knife he had in his waistband under his jacket. The deputy told Mascio "don't do that" as he drew his handgun and pointed it at Mascio.

The deputy told Mascio to get on his knees. Instead of complying, Mascio told the deputy that he would "set the stuff down." After Mascio refused to comply with five commands to "[g]et down on [his] knees," the deputy pepper sprayed Mascio. When Mascio finally went to his knees, the deputy told him to put his hands on the top of his head and warned him that "[i]f you make another reach for [the knife] you're gonna get shot." The deputy held Mascio at gunpoint until backup arrived.

After backup arrived, the deputy searched Mascio and found a knife with a two-and-a-half-inch fixed blade in a sheath on Mascio's waistband which was under Mascio's jacket.

DISCUSSION

I. *SUFFICIENCY OF THE EVIDENCE*

A. *Applicable Law*

"Every person who willfully *resists, delays, or obstructs* any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office" is guilty of a

misdemeanor. (§ 148, subd. (a)(1), italics added.) "The legal elements of [a violation of section 148, subdivision (a)(1)] are as follows: ' "(1) the defendant willfully resisted, delayed, or obstructed a peace officer, (2) when the officer was engaged in the performance of his or her duties, and (3) the defendant knew or reasonably should have known that the other person was a peace officer engaged in the performance of his or her duties." ' " (*Yount v. City of Sacramento* (2008) 43 Cal.4th 885, 894-895.)

Although section 148 is most often applied to the physical acts of a defendant, such as physical resistance, hiding, or running away from a police officer (*In re Muhammed C.* (2002) 95 Cal.App.4th 1325, 1329), it also applies to "passive delay or obstruction of an arrest, such as refusal to cooperate." (*People v. Curtis* (1969) 70 Cal.2d 347, 356, fn. 6, disapproved on another ground in *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1222, which was superseded by statute on another point of law as stated in *People v. Centeno* (2014) 60 Cal.4th 659, 676.) For example, in *In re Muhammed C.*, the appellate court concluded that "a reasonable inference could be drawn that appellant willfully delayed the officers' performance of duties by refusing the officers' [five] requests that he step away from the patrol car" (*In re Muhammed C.*, at p. 1330.)

"When the sufficiency of the evidence to support a conviction is challenged on appeal, we review the entire record in the light most favorable to the judgment to determine whether it contains evidence that is reasonable, credible, and of solid value from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Elliott* (2012) 53 Cal.4th 535, 585.) " 'Substantial evidence includes circumstantial evidence and any reasonable inferences drawn from that evidence.' "

(*People v. Clark* (2011) 52 Cal.4th 856, 943.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Little* (2004) 115 Cal.App.4th 766, 771.) The testimony of a single witness, if believed by the jury, is sufficient to support a conviction, unless that testimony is physically impossible or inherently improbable. (*People v. Young* (2005) 34 Cal.4th 1149, 1181.) " '[T]he relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Hatch* (2000) 22 Cal.4th 260, 272, italics omitted.)

B. Analysis

Mascio does not dispute that sufficient evidence revealed his knowledge that the deputy was a peace officer engaged in the performance of his duties and that the deputy was engaged in the performance of his duties. Relying on *People v. Quiroga* (1993) 16 Cal.App.4th 961 (*Quiroga*), Mascio contends that insufficient evidence supports the first element—that he willfully resisted, delayed, or obstructed a peace officer. Noting that he ultimately complied with the deputy's commands to get on his knees, Mascio claims that the momentary delay in doing so, accompanied by his verbal expressions of questioning why he was being subjected to the command and his request to first be allowed to place his possessions on the ground, does not constitute obstructing or delaying the officer.

In *Quiroga, supra*, 16 Cal.App.4th 961, the defendant challenged the sufficiency of the evidence supporting his conviction for violating section 148. An officer entered an apartment without a warrant and defendant demanded that the officer leave. (*Quiroga*, at

p. 964.) The defendant then argued with the officer before complying with orders to sit on a couch, to place his hands on his lap, and to stand up. (*Ibid.*) The *Quiroga* court determined that defendant's eventual compliance with the officer's orders did not violate the law because section 148 does not criminalize "a person's failure to respond with alacrity to police orders [and defendant] possessed the right under the First Amendment to dispute [the officer's] actions." (*Quiroga*, at p. 966.)

Unlike the defendant in *Quiroga, supra*, 16 Cal.App.4th 961, who had no weapon and was slow to respond to commands, Mascio ignored five stern commands, at gun point, to "[g]et down on [his] knees." During the encounter Mascio admitted having a weapon and reached under his jacket for the weapon. At the time, the deputy did not know what type of weapon Mascio possessed. Although Mascio later told the deputy that he had a knife, the deputy did not hear this during the heat of the encounter. Mascio finally complied with the deputy's repeated commands after the deputy administered pepper spray.

Mascio was not arrested for protesting prior to complying with the deputy's repeated orders to get on his knees, but for completely failing to comply with the orders until the deputy's use of force (pepper spray) ultimately led to compliance. (See *People v. Gutierrez* (2009) 174 Cal.App.4th 515, 518-519 [officer's use of pepper spray did not constitute excessive force where defendant refused to obey officer's commands and punched officer in the face].) The jurors reasonably concluded that Mascio's failure to get on his knees, after the deputy's repeated orders, constituted willful resistance to an

officer engaged in the performance of his duties. Accordingly, we affirm the judgment of conviction.

II. *MENTAL HEALTH DIVERSION*

Effective June 27, 2018, the Legislature created a new pretrial diversion program for defendants suffering from a qualifying mental disorder. (§ 1001.36, subds. (a) & (b)(1).) One purposes of the legislation was to promote "[i]ncreased diversion of individuals with mental disorders . . . while protecting public safety." (§ 1001.35, subd. (a).) A trial court may grant pretrial diversion if all the following eligibility criteria are satisfied: (1) a qualified mental health expert has recently diagnosed the defendant with a qualifying mental disorder, (2) the "mental disorder was a significant factor in the commission of the charged offense," (3) the defendant's symptoms will respond to treatment, (4) the defendant consents to diversion and waives his or her speedy trial rights, (5) the defendant agrees to comply with treatment, and (6) the defendant will not pose an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(A)-(F).)²

Mascio contends that the mental health diversion program applies retroactively and that he qualifies for treatment based on the trial court's act of referring him to mental health court for an evaluation. During the proceedings the court observed that Mascio acted impulsively and could not control his behavior. Accordingly, Mascio contends that

² Under section 1001.36, subdivision (b)(2), a defendant may not be placed into a diversion program for certain charged offenses, such as murder, voluntary manslaughter, rape, and several other specified crimes. The Attorney General does not contend that Mascio is ineligible for diversion under this subdivision.

his conviction should be conditionally reversed to permit the trial court to consider granting him mental health diversion. The People disagree, arguing that the statute is not retroactive, nothing in the record suggests that Mascio is eligible for mental health diversion, and a remand would be futile. We agree with Mascio.

The Supreme Court has said that it is an "inevitable inference" that the Legislature intends that new statutes imposing a lighter penalty should apply to every case in which the judgment is not yet final. (*People v. Superior Court (Lara)* (2018) 4 Cal.5th 299, 307.) In *People v. Frahs* (2018) 27 Cal.App.5th 784 (*Frahs*) the court concluded that the mental diversion program is ameliorative and applies retroactively to defendants whose judgments were not final at the time of its enactment. (*Id.* at p. 791.) Our Supreme Court has granted review of *Frahs* and will decide the issue. (*People v. Frahs* (Dec. 27, 2018, S252220).) Pending that decision, we agree with *Frahs* that section 1001.36 applies retroactively.

Accordingly, we turn to the record to determine whether Mascio potentially meets the threshold requirements for diversion. As a preliminary matter, it is unclear what evidentiary showing is required to warrant a remand. In *Frahs*, the defendant "appear[ed] to meet" only one of the requirements (a diagnosed mental disorder), but the court held that he had made a sufficient showing on appeal to warrant remand. (*Frahs, supra*, 27 Cal.App.5th at p. 791.) We need not decide this issue because our review of the record suggests that Mascio is potentially eligible for diversion and remanding the matter would not be futile.

The first factor is a recent diagnosis by a qualified mental health expert that Mascio suffers from a qualifying mental disorder. (§ 1001.36, subd. (b)(1)(A).) Here, Mascio told that probation officer that in 2007, while in prison, he was diagnosed with bipolar disorder and that he takes medication for the condition. Defense counsel also represented that Mascio receives social security disability income for this disorder.

Bipolar disorder is a qualifying mental disorder. (§ 1001.36, subd. (b)(1)(A).)

The record also indicates that the trial court believed that a mental disorder may have played a significant role in the commission of the charged offense. (§ 1001.36, subd. (b)(1)(B).) Before sentencing, the trial court queried defense counsel, who had spent two years as a mental health attorney, regarding the mental health court evaluation process. Without objection by the People, the trial court referred Mascio to mental health court. Ultimately, however, mental health court refused to screen Mascio because he had expressed the desire to appeal his conviction.

The record also suggests that Mascio would consent to diversion. (§ 1001.36, subd. (b)(1)(D).) Defense counsel represented to the court that Mascio was willing to undergo counseling and treatment. Speaking directly to the court, Mascio stated that he has struggled with drug addiction and mental illness, that he had "no problem seeking treatment. I believe that I can benefit from treatment." Further, Mascio's pursuit of diversion in this appeal suggests that he would agree to comply with treatment. (§ 1001.36, subd. (b)(1)(E).) Finally, the record at this point does not compel the conclusion that Mascio poses an unreasonable risk of danger to public safety if treated in the community. (§ 1001.36, subd. (b)(1)(F).) Mascio's prior convictions include

residential and commercial burglary, battery, vandalism, reckless driving and driving under the influence. Although the trial court declined to dismiss Mascio's prior strike for residential burglary, this decision requires a different analysis than a court's consideration of mental health diversion. Thus, the record here does not support the conclusion that a remand for consideration of mental health diversion would be futile.

Accordingly, we reverse the judgment with directions for the trial court to consider diverting Mascio under section 1001.36. We express no opinion on whether Mascio will be able to make a prima facie showing of eligibility on remand or how the trial court should exercise its discretion if it finds Mascio eligible for diversion.

III. *CORRECTION OF MINUTES*

On April 27, 2018, the trial court granted the People's motion to dismiss counts 2 and 3. Mascio contends, and the People agree, that the minute order does not comport with the court's oral pronouncement because it only reflects the dismissal of count 3. We direct the trial court to amend the minute order to also reflect the dismissal of count 2. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185 ["[A] court has the inherent power to correct clerical errors in its records so as to make these records reflect the true facts."].)

DISPOSITION

The judgment is conditionally reversed. The cause is remanded to the trial court with directions to conduct a diversion eligibility hearing under Penal Code section 1001.36 within 90 days from the issuance of the remittitur, unless there is good cause shown for a continuance of such hearing. If the trial court determines that defendant is eligible for diversion, the court should grant diversion and, if the defendant successfully

completes diversion, defendant's charges should be dismissed. If, however, the trial court concludes that defendant is not eligible for diversion or defendant fails to complete diversion, his conviction and sentence shall be reinstated. The trial court is further directed to correct the April 27, 2018 minute order as provided in part III of this opinion.

NARES, Acting P. J.

WE CONCUR:

AARON, J.

DATO, J.